IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

:: J U D G M E N T ::

S.B. CRIMINAL APPEAL NO.414/1986
The State of Rajasthan
Vs.
Mukna Ram & Ors.

DATE OF JUDGMENT : 09th JULY, 2007

P R E S E N T

HON'BLE MR. JUSTICE DEO NARAYAN THANVI

Mr. V.R.Mehta, Public Prosecutor.
Mr. P.N.Mohanani, for the accused respondents.

BY THE COURT :

This appeal is directed against the judgment dated 19.7.1986 passed by the learned Chief Judicial Magistrate, Jodhpur in Cr. Case No.195/79, whereby, the learned Magistrate has acquitted accused respondents Mukna Ram, Manak, Pancha Ram and Ramu Ram for offence under Sections 147, 148, 149, 326, 324, 323 and 379 IPC and convicted accused Lumba Ram for offence under Section 326 IPC and sentenced him to three years' rigorous imprisonment and to pay a fine of Rs.1000/-, in default of payment of fine to further undergo three months' rigorous imprisonment. Accused Lumba Ram was acquitted for

offence under Sections 147, 148, 324, 323 read with Section 149 IPC.

The State has preferred an appeal not against accused Lumba Ram but against four accused respondents as referred above. Learned counsel for the respondents submits that in this case, accused Lumba Ram preferred an appeal before the learned Sessions Judge against the order of conviction for offence under Section 326 IPC but accused Lumba Ram was released on account of compromise with the injured and by sentencing to the period already undergone. Record of that case was summoned by the order of this Court dated 3.7.2006 but it has been reported that record of the case has been weeded out as referred in the order of this Court dated 19.9.2006, which is regarding appeal No.43/96, which is said to be the new number of main appeal No.141/89 Lumba Ram Vs. State. However, record of the instant case is attached with this file and has been perused.

Learned counsel for the accused respondents submits that when no appeal has been filed against the main accused Lumba Ram by the State against the order of acquittal for criminal common object then the present appeal against the four accused respondents is not maintainable and does not survive. In this

regard, he has relied upon the decision of the Hon'ble Supreme Court in Hamlet alias Sasi and Others Vs. State of Kerala, reported in 2003 Cri. L.J. 4898, in which, while referring the scope of Section 149 IPC, the Hon'ble Supreme Court has held that four accused persons cannot be convicted with the aid of Section 149 IPC, because it falls short of minimum required number to form an unlawful assembly under Section 149 IPC, which is five or more.

Learned Public Prosecutor has not been able to respond to this objection raised by the learned counsel for the accused respondents. He submits that inadvertently, the name of accused Lumba Ram has remained out from the list of respondents in the body of appeal but having examined the contention of the learned Public Prosecutor if the memo of appeal is read with its prayer, it appears that appeal has been filed against the four respondents only and their conviction has been prayed for. When there is no prayer and there is no name of fifth respondent in the memo of appeal, the conviction for offence under Section 149 Cr.P.C. cannot be recorded because the minimum required number to form an unlawful assembly under Section 149 IPC is five or more.

Consequently, while maintaining the above order of

acquittal passed by the learned trial Magistrate, this appeal filed by the State stands dismissed.

(DEO NARAYAN THANVI), J.

ms rathore